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In the Supreme Court
of the United States

OCTOBER TERM, 1968

No. 1038

UNITED MEDICAL LABORATORIES, INC., an Oregon corporation,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation, WALTER CRONKITE and JAY McMULLEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition for a Writ of Certiorari

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OPINIONS BELOW

The opinions of the Oregon District Court are reported at 258 F. Supp. 735 (1966) (see also Appendix A to Petition, pp. 13-37).

The opinion of the Court of Appeals is reported at 404 F.2d 706 (1968) (see also Appendix B to Petition, pp. 38-68).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

CONSTITUTIONAL PROVISIONS

The relevant provisions of the United States Constitution are set forth in the Petition at page 3.

STATEMENT OF THE CASE

Petitioner in its Statement of the Case (pp. 4-6) conveys the impression that the Court of Appeals decided that the publications in question were defamatory of it but that no recovery was available because of the application of the *New York Times* case. The reason for the district court's dismissal of the complaint, as noted by the Court of Appeals, lay in the trial court's determination "that the defamation was without any such reference to United Labs, either class or special, as would enable it to maintain a libel action under Oregon Law." (App. B p. 40) The Court of Appeals merely held that although not mentioned in the publication, such reference to petitioner was possible and, therefore, this question, at least on the facts adduced by affidavit, was not subject to disposition "as a matter of law" or "on a summary basis." The statements were not, as intimated by petitioner (pp. 4-5), held to be actionable under Oregon law.

Petitioner's other statements insofar as they follow the language and reasoning of the opinions of the trial court (App. A) and the Court of Appeals (App. B) are basically correct.

ARGUMENT

Reasons for Denying the Writ

1. No Conflict Exists Between the Decision of the Court of Appeals With Respect to the Questions Presented on This Petition and the Already Settled Position of This Court on These Matters.

Although the petitioner and, indeed, the Court of Appeals have referred to the "public interest" rationale as an extension of the *New York Times* rule, the decision in reality is a correct and compelling application of the privilege consistent with the scope of the partial immunity[1] contemplated by this Court in its prior decisions. The decision rests upon the one unifying principle which has been explicit and implicit in all of this Court's decisions in this area—the public's interest in and the public's right to be informed about the subject matter of the communication. Also of relevance is the disagreement between the district court and the court of appeals as to whether or not the publications in question could be understood as referring to petitioner. This was raised to a constitutional consideration by this Court in the

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[1] The summary judgment record of this case reveals that petitioner has no proof of "actual malice" which might defease the privilege (App. B p. 50; App. A pp. 13, 28, 37).

New York Times case. When faced with a similar question of reference, this Court stated:

> ". . . the evidence was constitutionally insufficient to support a finding that the statements referred to respondent." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 292 (1964).

The decision of the court of appeals is in accord with the step by step approach heretofore undertaken by this Court in defining the scope of the privilege. In view of this, no one of these decisions to date can be considered as finally determining the elements necessary for application of the rule. Petitioner would have this Court restrict the constitutional protection to situations involving both a "matter of public interest" *and*, either a "public figure" or "persons with a practical ability to counterargue or respond considering the mode of the publication involved." (pp. 2, 3)* In support of its interpretation of the scope of the *New York Times* rule petitioner relies almost exclusively on this Court's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). This Court has on many occasions clearly indicated that no such narrow interpretation of the constitutional privilege was intended.

This Court's frequent references to, and reliance upon, the "public interest" aspects of the communications held privileged are too numerous to fully enumerate here. From the inception of the privilege in

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* All page references are to the Petition for Writ of Certiorari and Appendices unless otherwise stated.

New York Times, it has been clear that the nucleus around which all of the cases orbited was the public interest or concern in the subject matter of the publication. Subsequent decisions have adopted this rationale by stating that protection of discussion of matters of public concern is, first, the basis for the decisions and, second, the key to determining the categories of plaintiffs that must overcome the privilege to recover. This was initially apparent from this Court's reference to the "like rule" of *Coleman* v. *Mac Lennan*, 78 Kan. 711, 98 P. 281 (1908):

> "'. . . This privilege extends to a great variety of subjects, and includes matters of public concern, public men and candidates for office.' 78 Kan., at 723, 98 P., at 285" *New York Times Co.* v. *Sullivan*, supra, at 281-82.

Professor Pedrick, in his comprehensive article on *New York Times*: *"Freedom of the Press and the Law of Libel: The Modern Revised Translation,"* 49 Cornell L.Q. 581, equates the scope of the constitutional privilege in *New York Times* with that of the fair comment privilege in the Restatement of Torts, Chapter 25, Section 606, which privilege applies generally to all discussion of "matters of public concern." Ibid. n. 43.

When given the opportunity in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), this Court moved to establish that Pedrick's interpretation of the expansive scope of the privilege was correct. Justice Brennan in his opinion for the Court clearly defined the scope of the *New York Times* rule:

". . . [W]e reject any suggestion that our references in *New York Times*, 376 U.S., at 282, 283, n. 23, and *Garrison*, 379 U.S., at 74, to *Barr* v. *Matteo*, 360 U.S. 564, mean that we have tied the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 590-591 (1964)." 383 U.S. at 84-85 n. 10.

It cannot be questioned that informing the public on such an inherently grave matter of public concern—"conditions allegedly capable of wide-spreadedly affecting public health" (App. B p. 48)—serves a function contemplated within the scope and protection of the privilege. Reference to the *Butts* decision alone will supply ample verification of respondents' position.

What is basic to that decision is this Court's recognition that it was "at the threshold of this new constitutional development," and that the "history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right." It noted that the Court's primary concern had been the determination of the "extent of the right and the surrounding safeguards necessary to give it 'breathing space' ", rather than " 'the real problem' of defining or delimiting the right itself." 388 U.S.,

at 148-49. It further states that "[t]he dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.' " Id. Further support for respondents' position is found in this Court's other language in *Butts*, that although this "right to communicate information of public interest is not 'unconditional' ", *New York Times* has explicitly circumscribed the permissible sanctions. Id., at 150. Moreover, the Court specifically notes that its reasoning does not affect any "libel or other tort actions not involving public figures *or* matters of public interest." (Emphasis supplied) Id., at 155 n. 19.

Quoting from Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), petitioner complains that the court below disregarded certain "factors" such as the claim that ". . . plaintiff did not thrust itself into the arena of debate as a public figure or to plaintiff's inability to adequately defend itself under the circumstances of this attack" (p. 9). In fact, the Court of Appeals considered the so-calied "limelight" argument and found that because of the nature and extent of petitioner's capacity to affect health, its activities were ". . . as naturally entitled to public gaze and interest, and as inherently subject to the right of public information and discussion, as were the field and activity in *Butts* —or in *Walker* and *Pauling*" (App. B p. 49).

It is thus clear that not only is petitioner's interpretation of the scope of the *New York Times* doctrine incorrect, but so too is its understanding of the thrust of the *Butts* decision. Wally Butts and General Walker were subject to the limitations imposed by *New York Times* because the public had a legitimate interest in their conduct.

In both cases, this Court noted that the "public figure" plaintiff had sufficient fame or notoriety prior to the alleged defamation to obtain access to the news media and thereby present public rebuttal. Certainly, the lack of such access would not seem to affect the public's legitimate interest in the individual's conduct and would, therefore, be constitutionally unimportant. Thus, the fact that *Butts* and *Walker* were presumed to have access to the media appears merely to have been an additional reason for, and not a prerequisite to the application of the *New York Times* standard of protection. Moreover, "The public interests protected by the *New York Times* rule are interests in discussion, not retaliation . . ." *Rosenblatt*, supra, at 84-85 n. 10.

Whatever might be the significance of an individual's economic ability or inability to purchase television or radio time to counter-argue against alleged defamatory statements, that question is not present in the case at bar. The record here shows that respondents gave television time to an industry spokesman, Dr. Winkelman, who insisted that mail order medical laboratory tests are and can be performed accurately (App. B pp. 67-68).

In addition, the precise argument made by petitioner (p. 11) as to the cost of replying is, in itself, a sufficient basis for disregarding access to the news media as a necessary condition. Such a condition ultimately suggests constitutionally unsupportable discrimination since the constitutional privilege would depend on the relative wealth of the individual defamed. The proposition that a rich man, able to purchase time on television or space in a newspaper, is less entitled than a poor man to legal protection of his reputation would violate the concept of equal protection guaranteed by the Fourteenth Amendment. This Court has not intended in its *New York Times* line of decisions to so delimit the scope of the privilege.

In a privacy action, public interest in the subject matter of the publication is sufficient as the sole basis for the privilege. See *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). There is no persuasive logical reason why an individual's interest in his reputation should receive more protection than his interest in his privacy. Indeed, the right of privacy would seem more substantial than reputational rights, having risen under certain circumstances to constitutional stature. See, e.g. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The Court of Appeals, aware of the fact that this Court in *Time Inc.* v. *Hill*, supra, at pp. 390-91, warned against a "blind application of *New York Times Co.* v. *Sullivan*," undertook to apply "these

principles in (the) discrete context" of the legal and factual situation involved. This is in accord with this Court's normal policy of refusing "to formulate a rule of Constitutional Law broader than is required by the precise facts presented in the record" (See, *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961)), and its traditional reluctance in the area of freedom of speech and of the press as previously noted in the *Butts* decision to fully define and delimit the scope of the right. But this cannot be interpreted to mean that each new fact situation presented requires independent consideration and final adjudication by this Court. It was merely decided that because of the important constitutional protection involved and the Court's experiences in other areas of free speech, the rule should be allowed to evolve on a case by case basis, lest an initial definition of the scope prove insufficient or overreaching. The Court of Appeals analysis conforms in all respects with the intent and directives of this Court in its applicable decisions.

Neither is the *New York Times* privilege to be confined to "political discussion" as suggested by petitioner (p. 8). In that case this Court stated that the "constitutional safeguard" of freedom of expression upon public questions " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political *and social* changes desired by the people.' *Roth* v. *United States*, 354 U.S. 476, 484." (Emphasis Supplied), *New York Times Co.* v. *Sullivan*, supra, at 269. In applying the *New York Times* rule in *Butts* and *Walker*, this Court relied on the

phrase from *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), used by the majority in the *Hill* case and by Justice Douglas in his concurring opinion in *Rosenblatt*, that freedom of discussion " 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'." 388 U.S., at p. 147. These statements by this Court are sufficient to dispel petitioner's assertion that the *New York Times* rule is only operative in a governmental context. No such shallow interpretation of the needs of society is possible.

Petitioner misunderstands the rule adopted by the Court of Appeals. It claims that the decision gives the defamer "complete control over his own immunity, for it is his statement . . . that determines whether public interest is involved" (p. 7). Of course, the Court of Appeals is speaking of an objective public interest, independent of the publication in question. The public interest in human health hazards is and always has been constant and does not depend for its objective existence on respondents' publication. The privilege will, therefore, not be available against all private individuals as petitioner contends, but only those individuals intimately involved in a matter of legitimate public interest.

Since petitioner is concededly engaged in a "public business" (*St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968)), which respondents suggested might require "government supervision" (App. B p. 68), its

activities affecting public health obviously fall under the *New York Times* rule. Thus, the Court of Appeals has properly found the factual setting of this case to be within the ambit of the *New York Times* privilege.

Petitioner predicts that should this decision be "allowed to stand," the publication media will effectively be enabled to fully defame private persons "so long as a subject of public interest is chosen . . . as a mode of attack" (pp. 11, 12). No such choice is available to the publisher. Petitioner overlooks the requirement that the party defamed have a legitimate connection with the subject matter of the communication which is of interest to the public. The Court of Appeals' opinion does not sanction indiscriminate and unbridled attacks on the reputations of private individuals. Instead, it provides that only when such persons are involved in matters of public interest about which the public has a right to be informed will their right to recover be proscribed by the *New York Times* privilege.

Petitioner would have the protection afforded by the free speech and press guaranty of the First and Fourteenth Amendments vary with the "mode of publication" employed (p. 10). This Court has made it clear that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary," and that whatever the method of expression, the same rules apply. *Joseph Burstyn Inc.* v. *Wilson*, 343 U.S. 495, 502-503 (1952). This principle applies with equal force to television broadcasts. *St.*

Amant v. *Thompson*, 390 U.S. 727 (1968), *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). A federal constitutional rule distinguishing among the forms of expression as a basis for defining the scope of a privilege would be incredible, in light of the Court's mandate that the scope of the privilege is to be guided by "the functions it serves."

2. No Conflict Exists Between the Decision Rendered by the Ninth Circuit Court of Appeals in the Instant Case and the Decision of Any Other Court of Appeals on the Questions Presented in This Petition.

There can be no question that the Fifth Circuit Court of Appeals in *Time, Inc. d/b/a, "Life"* v. *McLaney*, — F.2d — (No. 25585, C.A. 5, January 3, 1969) is in full agreement with the Court of Appeals in the instant case as to the scope of the *New York Times* privilege. Indeed, that court specifically noted its accord with the Ninth Circuit opinion in the instant case.

The Court concluded:

> ". . . that the constitutional privilege extends to discussions by specific individuals, not associated with any government if those individuals are involved in matters of important public concern."

The public's concern in *McLaney* was with the gambling element's influence in the government. In fact, "the announced policy of the opposition to the present government was the elimination of racketeer gambling." *McLaney*, supra. Therefore, the subject matter of the publication — McLaney's activities in

connection with both the gamblers and the new government—and not his position as a public figure was "the proper subject of inquiry and of public interest," and the true basis for the application of *New York Times*. Consequently, the decision in *Belli* v. *Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (C.A. 5, 1967), cert. den. 393 U.S. 825, insofar as it discussed the scope of the *New York Times* rule, and if understood to be contrary to *McLaney*, can no longer be considered the position of the Fifth Circuit.

3. The Judgment for Respondents Can Be Sustained on Non-Federal Grounds.

The Oregon district court disposed of this diversity case under principles of Oregon substantive libel law (App. A pp. 22-28). The Court of Appeals believed, after reading the Oregon cases, that the lower court's conclusions as to the Oregon law of "class libel" ". . . accorded too narrow a scope to Oregon libel law . . ." (App. B p. 41).

Respondents respectfully submit that the Oregon district judge's determination of the local law was entitled to great weight, and that his evaluation of the controlling Oregon cases of *Blaser* v. *Krattiger*, 99 Or. 392, 195 P. 359 (1921), characterized as illustrative of "nonactionable class libel" in *Marr* v. *Putnam*, 196 Or. 1, 22-23, 246 P.2d 509 (1952), should have been left undisturbed by the Court of Appeals (cf. *Steele* v. *General Mills, Inc.*, 329 U.S. 433, 439 (1947)). Moreover, in upholding the district court's interpretation of the state law in a diversity case, rather than

that of the court of appeals, this Court in the *Steele* case concluded that to do otherwise would be unacceptable since it:

> ". . . would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts." *Steele* v. *General Mills, Inc.*, supra, at 441.

If dismissal may be sustained on a non-federal ground, there can be no reason for the Court to consider this petition for certiorari. Under *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947), respondents may advance this argument without filing a cross-petition for certiorari.

CONCLUSION

Since the foregoing discussion makes obvious the lack of grounds for granting the writ of certiorari, the Court should deny the petition.

Respectfully submitted,

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